

**TITLE**

Labour rights

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**DATE DEPOSITED**

25 September 2018

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# Labour Rights

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*Accepted Version*

*Citation: Luke Mason, 'Labour Rights' in Rüdiger Wolfrum and others (eds), Max Planck Encyclopedia of Comparative Constitutional Law (OUP 2018).*

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## **A. Introduction: Labour Rights and Constitutional Law**

### ***1. Overview***

- 1 Labour rights can be understood as those parts of law which grant workers, whether individually or collectively, particular entitlements connected to their employment, or by virtue of their status as workers. These rights are often connected to their terms of employment and how those terms are negotiated, in particular through mechanisms of collective bargaining and the role of trade → *unions*. Paradigmatic examples of labour rights attached to the individual worker might include guarantees of fair and safe conditions of work, the prohibition of certain forms of → *discrimination*, and protections against unjustified dismissal. Collective labour rights include the right to → *freedom of association*, in particular in relation to trade unions, the right to bargain collectively, and the right to strike. Such collective rights might belong to individual workers, or to collective organizations, in particular trade unions, themselves. Labour rights are an aspect of a broader field of law, labour law, which emerged in many countries in the 19<sup>th</sup> century and early 20<sup>th</sup> century. Labour law was, and is, primarily concerned with the regulation of the terms of work according to different principles from those which apply to ordinary commercial contracts. The primary function of labour rights to guarantee certain minimum standards and other entitlements for workers. In many legal traditions, the emergence and idea of labour rights are intrinsically linked to organized labour and the trade union movement, and this is recognized in many constitutional

systems through the institutionalization of representatives of workers and employers in 'pluralist' pseudo-legislative structures which are charged with the production of the norms which govern certain aspects of employment. Much legislation in the field of labour law in many legal systems is developed within ordinary legislation rather than at constitutional level, however labour rights and constitutions interact in a series of ways. This entry is concerned primarily with the relationship between labour rights and constitutions and/or constitutional law, rather than focusing labour rights more generally within different constitutional orders.

- 2 The relationship between labour rights and constitutional law is often a complex one for a variety of reasons. There are several distinct but connected tendencies in the relationship between labour rights and constitutional law. The most obvious and visible connection is the placing of different types of labour rights within constitutional documents and the emergence of certain labour rights as 'constitutional' in status, phenomena which themselves have numerous distinct variations across history and between jurisdictions. A second important relationship between labour rights and constitutional law is the tension between certain labour rights and other entrenched constitutional values or fundamental rights within the same legal order, a tension which has sometimes resulted in jurisprudence regarding the constitutional legality of certain labour rights. Thirdly, there is the application in certain legal systems of other constitutional rights or values to the employment relationship, sometimes through their → *horizontal application* to private law employment relationships with a consequent impact on the content of labour rights or their entrenched status.

## ***2. The Nature of Labour Rights and Their Place in National Constitutions and International Law***

- 3 As detailed in this entry, there is a remarkable heterogeneity in terms of the place, treatment and content of labour rights in national constitutions, both across time and between jurisdictions. However, there is a core set of labour rights which appear in many national constitutional documents. International and regional law covering labour rights and their meaning, in particular the role of the International Labour Organization, has contributed to this emergence of a canon of core labour rights. In more recent years, the notion of 'labour rights as human rights' has further developed an element of consensus in this respect. While labour rights' place in the legal system in general, and within constitutions in particular, are inherently linked to the political and economic development and choices within jurisdictions, one can develop an indicative account of core individual and collective rights which appear in constitutions.
- 4 Core individual labour rights include the following: the right to non-discrimination and the guarantee of → *equality* of treatment regardless of certain protected personal characteristics or social condition or status; the right to fair working conditions, in particular fair wages and limits to working time; guarantees of health and safety at work (→ *right to health*); the right not to be unfairly dismissed. These

rights tend to belong to the individual employee or worker, although whether their presence in the constitution results in an enforceable claim right, whether against an employer or against the state, depends on the procedural characteristics of the individual legal system. Collective labour rights typically found within constitutions are generally based around the core civil or political right to freedom of association. Many constitutions build upon this core legal notion to also contain more specific rights for individuals to belong to a trade union. Specific collective labour rights often then focus on procedural rights to collectively bargain terms of employment, and the right to strike and take other forms of industrial action. The precise nature of these collective rights and their enforceability depends strongly on the system of industrial relations in the country in question. In some constitutional orders, collective bargaining processes are part of the legislative processes of the legal system, with agreements having *erga omnes* effects, whereas other legal systems give such processes a more limited role in providing a representative mechanism for employees and employers' organization to negotiate contractual terms of employment and other matters. This entry explores the development of these rights in different constitutional traditions, both in terms of their status as constitutional rights and their more general place within the constitutional principles of the legal system.

- 5 International law has played a key role in influencing the content and interpretation of labour rights within constitutional traditions over the past century. The most prominent institution in this regard has been the **International Labour Organization (ILO)**. Founded in 1919, the ILO is now an agency of the United Nations with responsibility for international labour standards and employment law. It has a unique 'tripartite' structure, made up of representatives of governments, employers and workers. While the ILO has an influential role in the issuing of Recommendations on labour standards, its most important task stems from its legislative function through the production of Conventions which create binding standards under international law for ratifying states. The ILO's system largely rests on a system of voluntary compliance, however it has been influential in creating a canon of labour standards in various fields. There now exist almost 200 Conventions in various fields of labour law, creating an extensive canon of international law covering labour rights. Particularly significant in this regard is the Declaration on Fundamental Principles and Rights at Work of 1998, which prioritizes the fields of freedom of association, collective bargaining, the abolition of child labour, the abolition of forced labour and the prohibition of discrimination at work (Seite: 4 **Forced Labour / Slave Labour**). The Declaration asserts that certain core Conventions in these fields constitute fundamental principles which are binding on all member states regardless of ratification. In some constitutional systems, ILO standards may have direct or indirect effect within the legal order, giving them a quasi-constitutional role, with ILO standards sometimes referred to by national and international courts in their interpretation of labour rights provisions.
- 6 In addition to the important role of the ILO in developing a canon of labour rights in international law, the place of labour rights within constitutional orders has been

further augmented by other complementary phenomena. On the one hand, an intellectual trend to view labour rights as ‘human rights’ has emerged, seeking to underline their pre-emptive status, and their importance within constitutional frameworks. This has been accompanied by a recognition of such notions within regional and international legal fora, such as the **Seite: 5 European Court of Human Rights (ECtHR)** finding that Art. 11 of the **Seite: 5 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)** on the freedom of association contains a right to bargain collectively and the right to strike (*Demir and Baykara v Turkey* (ECtHR) (2008)), and the Court of Justice of the European Union (**Seite: 5 European Union, Court of Justice and General Court**) finding that the same concepts constitute fundamental rights and general principles recognized by the law of the European Union (*Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (CJEU) (2007) and *International Transport Workers Federation v Viking Line* (CJEU) (2007)). On the other hand, a body of international law instruments, particularly at regional level, has emerged with a specific focus on → *social rights*, of which labour rights form the mainstay. Such instruments include the global **International Covenant on Economic, Social and Cultural Rights (1966)** the **European Social Charter** and the Additional Protocol to the **Seite: 5 American Convention on Human Rights (1969)** in the area of economic, social, and cultural rights.

## **B. The Inclusions of Labour Rights within Constitutional Documents and Catalogues of Rights: A Historical Typology and the Present Situation**

- 7 The development and place of labour rights within constitutions has a complex history. Labour rights were generally absent from early canons of constitutional rights, which tended to focus on → *civil and political rights*. Over the many decades that followed labour rights came to have more of a central place within many constitutional orders and documents. This tension is still visible today in the absence of a canon of labour rights in some modern constitutions, and the variation in form and content of rights in those constitutional documents which do contain labour rights. This section provides an overview of the emergence of labour rights in different forms in constitutional documents, citing important historical examples, thus constituting a sort of historical typology. It then provides a comparative perspective on modern constitutions and the place of labour rights therein.

### ***1. Early ‘Liberal’ Constitutions and the Precarious Place of Labour Rights***

#### **(a) United States: Thirteenth Amendment (1864)**

- 9 The early ideals of → *constitutionalism* and the prevailing political philosophies which influenced the earliest constitutional documents in the modern tradition had

an ambivalent attitude towards labour rights. However, the constitutional documents of the earliest iterations of the modern constitutional state contain some elements of labour rights, and lay the general foundations for the legal regulations of labour rights in general. While the Constitution of the United States of America: 17 September 1787 (as Amended to 7 May 1992) (US) is overwhelmingly associated with the primacy and entrenchment of individual and the sanctity of property and contract rights (→ *right to property*), the Thirteenth Amendment to the US Constitution provides for the prohibition of **slavery** and involuntary servitude, and provides a federal competence to enforce this prohibition. The prohibition of slavery, thus establishing voluntary, contractual employment as the basis upon which work is legally conceived, remains a cornerstone of most catalogues of constitutional rights and, simultaneously, of contractual systems of labour rights, and of the contract as the cornerstone of working relationships in constitutional states.

#### **(b) Post-Revolutionary France (1793): the Right to Work**

- 10 The historically significant document, the French Constitution: 24 June 1793 (Fr), known as the Constitution of the Year I, which was extremely influential but never fully applied, contained numerous social rights within the **Seite: 6 French Declaration of the Rights of Man and of the Citizen (1789)**. Most significantly, these included Art. 21 which granted a core labour right, the ‘right to work’, and the guarantee of assistance to those unable to do so. By the time of the constituent assembly for the 1848 French Constitution, the inclusion of this right caused significant tensions between rival political factions, and the document focused instead on civil and political rights, at the expense of labour rights. However, an iteration of this constitutional ‘right to work’ can be found in numerous modern constitutional documents, such as the Constitution of the Italian Republic: 22 December 1947 (as Amended to 20 April 2012), Art. 4 (It), the Constitution of the Kingdom of Spain: 6 December 1978, Art. 35 (Spain), and the preamble to the current Constitution of the French Republic: 28 September 1958 (as Amended to 23 July 2008) (Fr), as well as many constitutions globally. However, early constitutional documents influenced by the French and US Constitutions, reflected a similar core focus on civil and political rights and the prioritization of contract and property, which themselves, however, continue to form the basis of the majority of private law employment relationships in most legal orders.

## ***2. The ‘Constitutionalization’ of Labour Rights: Pre-World War II***

#### **(a) Mexico (1917)**

- 11 Following both the growth of the labour movement and more general political pressure for increased workers’ rights in the industrial world, certain early 20<sup>th</sup> century constitution documents attempted to place labour rights on an equal footing with other constitutional rights within written constitutions. The first significant

historical example of this was, in 1917, the Political Constitution of the United States of Mexico: 5 February 1917 (as Amended to 5 February 2017) (Mex), which contained an extremely comprehensive catalogue of labour rights within Art. 123 of that document. That provision, which remains in force today, established a legislative obligation to develop rights connected to working time, industrial action, time off, unfair dismissal, workplace equality and specific rights for working mothers and pregnant women. This document was very influential in the development of constitutional documents in European countries around the same period, in particular Germany and Russia. The 1917 Mexican Constitution was also an inspiration for a significant change in Latin American constitutionalism more generally; in the decades following its promulgation, several other Latin American countries modified their constitutions to include a similar catalogue of social rights and a more ‘pluralist’ form of constitutionalism, moving away from the classical liberal model of the constitution. Particularly relevant historical examples include the Constitutions of Brazil (1938), Cuba (1940), Uruguay (1942), and Argentina (1949), all of which have subsequently been superseded by new constitutional documents, incorporating some version of such a catalogue, and the still extant Constitution of Costa Rica: 7 November 1949 (as Amended to 24 August 2015) (Costa Rica).

#### **(b) Germany: Weimar Republic (1919)**

- 12 The Constitution of the German Reich (Ger), often known as the → *Weimar Constitution (1919)*, contained significant sections relating to labour rights, among many innovative elements at the time. The document contained a multiplicity of labour law provisions, much inspired by the work of Hugo Sinzheimer. Those elements connected to labour rights in Chapter V of the text are sometimes known as the ‘Labour Constitution’. As such, as well as the ‘liberal’ rights to property and contract, the constitution contained specific and detailed labour rights and norms, although many were left unimplemented. Art. 157 guaranteed the protection of labour by the Reich, and mandated the promulgation of a ‘unified’ labour law, in effect a labour statute or code, while Art. 159 established the right to join a trade union for the protection and promotion of one’s interests at work. Arts 161 and 162 set out the goals of establishing systems of social insurance and international labour rights respectively. Art. 165 is the most well-known aspect of the Weimar Constitution. It is an extremely detailed provision which provided for the establishment of a system of Works and Economic Councils at firm, district and national level for the purpose of the co-determination of industry by labour and capital, a radical and influential form of ‘industrial democracy’, establishing constitutional labour rights as norm-producing provisions as well as individual and collective subjective entitlements. This provision, and contemporary equivalents in other legal systems, are also sometimes seen as the application of the general principles of constitutionalism to the employment context. These provisions have proved influential not only due to the prominent place of detailed labour law provisions within a constitutional document, but also because they are seen as applying more general constitutional principles, such as democracy, equality and



→ *participation*, to the traditionally ‘private law’ sphere of the workplace. The short-lived Weimar Constitution has proved extremely influential for contemporary models of constitutionalism which seek to move beyond the ideas of the *Rechtsstaat* and incorporate social goals such as the achievement of labour rights. In reality, very few of the goals and obligations laid down in the ‘Labour Constitution’ of the document were ever fully implemented.

#### **(c) Soviet Russia (1918)**

- 13 The 1918 Constitution of the Russian Soviet Federated Socialist Republic (Russ), adopted following the 1917 ‘October Revolution’, set out the goals and values of the newly formed Socialist state, with numerous references to the power and role of working people, in particular in the ruling Soviets, or legislative councils. As well as establishing the existing Declaration of Rights of the Working and Exploited People as being a single, basic law alongside the constitution, it also set out certain specific labour rights. Most significantly, Arts 15 and 16 of the now defunct document laid down detailed rights connected to freedom of association of workers’ and its exercise. Similar general statements of the rights of workers are now often found within constitutional documents.

#### **(d) New York (1938)**

- 15 A final significant pre-World War II constitutional document in relation to labour rights is the current Constitution of the State of New York: 20 April 1777 (as Amended to 3 November 2009) (US), which was amended, following a referendum in 1938, to include the new § 17 which states that ‘Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed’. It goes on to guarantee a limit on working hours, the payment of the prevailing rate of wages and the right to freedom of association. §18 also underlines the competence to pass laws regulating the terms of employment. Constitutional statements of fair wages and the competence and/or duty for the legislator to pass them are now relatively common in constitutional documents. The New York State Constitution is also significant because it adopts the language of the preamble to the ILO’s founding documents (‘labour is not a commodity’). Such statements of the intrinsic value of workers and their labour became common structuring principles in many constitutional documents in the second half of the 20<sup>th</sup> century.

### ***3. Post-War Constitutions and the Entrenchment of Labour Rights as Fundamental Rights***

#### **(a) Italy**

- 16 The pre-war ‘experiments’ with labour rights within constitutional documents had had limited success, with the labour rights concerned often not being fully implemented, often remaining as merely aspirational provisions. Following World War II, there was a renewed attempt to enshrine labour rights within the ‘pluralist’ post-war constitutional order of states through their inclusion in new constitutional

documents. Perhaps the most celebrated is the Constitution of the Italian Republic: 22 December 1947 (as Amended to 20 April 2012) (It), which contains the symbolically significant first Article which reads ‘Italy is a democratic republic founded on labour’. The text in general is often described as ‘constitutionalizing’ labour rights in Italy. Alongside echoes of earlier attempts to ‘constitutionalize’ labour rights, such as the ‘right to work’ in Art. 4, echoing the French Constitution of the Year I (Fr), much of the content reflects the aspirations of the Weimar Constitution, and contains various other specific labour rights. In particular, it provides for the promotion of labour in all its forms the right to a fair rate of pay (Art. 35), equal pay between men and women and the protection of female and child workers (Art. 37), the freedom to join a trade union, the right to strike, and detailed provisions on collective bargaining and its *erga omnes* effect (Arts 39 and 40). Of particular significance is the jurisprudence of Italian Courts which has held that particular labour rights may be directly enforced (for instance, a case involving the payment of fair wages, *Tribunale Firenze* (23 March 1948)), overcoming the purely aspirational or non-implemented nature of labour rights in certain constitutional orders, in particular pre-World War II constitutions. However, the provisions on collective bargaining have never been fully implemented.

#### **(b) Germany, France and Japan**

- 17 The Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 23 December 2014) (Ger) contains a number of labour rights, but contains a far less detailed treatment of these matters than its predecessor, the 1919 Weimar Constitution. As Kempen explains, the Basic Law avoids an overt focus on labour, and does not specify the shape or content of labour rights, but rather leaves to the legislator the question of how precisely to implement the principle of the *Sozialstaat*, the social state, contained in the constitution in Arts 20 and 28 (→ *social or welfare state*). However, in keeping with modern constitutions, it does contain several key labour rights, notably the freedom of association, with particular reference to the improvement of working conditions and labour disputes (Art. 9) and the right to → *Seite: 9* *freedom of occupation or profession* (Art. 12). Constitution of the French Republic: 28 September 1958 (as Amended to 23 July 2008) (Fr), the Basic Law is significant among post-War European constitutions for its lack of treatment of detailed labour rights. The Constitution of Japan: 3 November 1946 (Japan) adopted a similar model to this German one, entrenching only a limited core of labour rights, namely workers’ freedom of association (Art. 28), and the right (and obligation) to work and the prohibition of child labour (both under Art. 27), with Art. 27 stipulating that other labour standards will be established by the legislator.

#### **(c) Spain**

- 18 The more recent Constitution of the Kingdom of Spain: 6 December 1978 (as Amended to 29 September 2011) (Spain) contains a more detailed treatment of labour rights than other post-War European constitutions. Del Rey Guanter

describes this as the ‘industrialization of the constitution’. Alongside numerous provisions which have a specific connection to labour law in the Spanish Constitution, such as the right to join a trade union and the right to strike (Art. 28(2)) the right to work (Art. 35) and provisions regarding the right to collective bargaining (Art. 37) there exists also a specific provision which appears to be inspired by both Art. 157 of the Weimar Constitution and the Italian Workers’ Statute of 1970 (It): Art. 35(2) provides that the law will establish a ‘Workers’ Statute’, which would contain a more detailed delineation of labour rights. Such a law was passed in 1980.

#### (d) European Union

- 19 The shift of certain constitutional functions and forms to the supranational level (→ *Seite: 10 supranational constitutionalism*), most clearly in evidence in the context of the European Union (‘EU’), has forced a renewed questioning of the place and role of labour rights within constitutional orders. The ‘constitutional’ documents and principles of the EU, in particular its founding treaties, did not originally contain a great emphasis on labour rights, with some exceptions. The original Treaty establishing the European Economic Community of 1957 did not contain a catalogue of enforceable labour rights or related competences, with these matters delegated to the social and employment policies of member states (**Seite: 10 European (Economic) Community**). The three notable exceptions to this were the principles of equal pay for equal work between men and women (now contained in Art. 157 of the Treaty on the Functioning of the European Union (TFEU)), non-discrimination on the basis of nationality (now Art. 18 TFEU), and free movement of workers (now Art. 45 TFEU). Due to significant jurisprudence of the Court of Justice of the European Union (CJEU), such as in *Defrenne v Sabena (No. 2)* (CJEU) (1976), these rights came to be given ‘direct effect’, and could be enforced directly by individuals within EU member states, both against member states, and, in certain circumstances, against other individuals through a form of → *horizontal application*. In the intervening period other labour rights have been given direct effect, thus granting them a status akin to constitutional law in terms of their entrenched status and enforceability in member states. Equally significantly, the labour rights contained within the Treaties of the EU expanded significantly as a consequence of the growing political desire to coordinate policy in that field. As a consequence, the TFEU now contains various labour rights, or connected competences, notably in the fields of discrimination (Art. 19) and ‘social dialogue’, that is legislative and other procedures through which trade unions and representatives of management may regulate the terms of work (Arts 153 and 154). The **Lisbon Treaty** of 2009 established that the **Seite: 10 Charter of Fundamental Rights of the European Union (2000)** had the same legal status as the European Union Treaties, this entrenching at a ‘constitutional’ level several labour rights contained within Title IV on ‘Solidarity’, concerning fair working conditions, unfair dismissal and collective representation rights. These rights are not themselves directly effective, confirmed in recent jurisprudence such

as *Association de médiation sociale v Union locale des syndicats CGT* (CJEU) (2014). The CJEU has also developed jurisprudence which has held that other labour rights, such as the right to freedom of association and the right to strike are ‘fundamental principles’ of EU law, see for instance *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (CJEU) (2007). The current status of labour rights in the EU constitutional order illustrates the complexity of such matters in conditions of deep economic and legal integration and constitutional pluralism whereby there are complex competing legal orders with potentially conflicting legal principles (see also → *Seite: 11 relation of constitutional courts / supreme courts to EU courts*). The EU remains an outlier in international trade organizations with quasi-constitutional structures in that it has come to incorporate a limited focus on labour rights.

#### ***4. Other Modern Constitutions***

- 21 In recent years there has been a marked tendency to include an extensive list of labour rights within new written national constitutional documents where these contain an entrenched catalogue of rights, building on the experiences of both early and post-war models of labour rights in written constitutions, and reflecting an emerging corpus of influential international labour rights legislation, such as the Conventions of the International Labour Organization and the European Social Charter. The archetypal document in this respect is the relatively recent Constitution of the Republic of Colombia: 5 July 1991 (as Amended to 4 April 2017) (Colom), which has sometimes been known as the ‘Constitution of Rights’. In this context, of particular significance is Chapter II which contains a relatively detailed series of labour rights, although some of these remain unimplemented. This tendency is not, however, universal. The Canadian Charter of Rights and Freedoms, contained in the Constitution Act 1982 (Can), for instance, which served to constitutionally entrench a catalogue of rights, contains no detailed list of social or labour rights, focusing instead of archetypal liberal political, civil and economic entitlements.

#### ***5. Overview of the Place of Labour Rights in Current Constitutional Documents***

- 22 The place of labour rights within constitutional documents has become particularly common, although the content, range and scope of these varies still varies considerably between different jurisdictions. Although labour rights have now come to be seen as part of the canon of constitutionalist thought and fundamental rights in many respects, there continues to exist a divergence in practice, both in terms of which labour rights are included and how they fit into the general constitutional structure. Building on the historical genealogies of constitutional labour rights within this section, is possible to sketch a loose typology of approach within current constitutional frameworks.

### **(a) Traditional ‘Liberal’ Constitutional Instruments and Other Constitutions with No Explicit Canon of Labour Rights**

- 23 There exist numerous extant constitutions and entrenched constitutionalist ‘bills of rights’ (→ *bill of rights*) which make no explicit reference to labour rights, except for those civil and political rights which might be seen as overlapping with the foundations of labour law, such as rights to equality, freedom of association and the prohibition of forced labour. Common law countries such as the US, the UK, Australia and Canada fall into this category, as do certain countries with markedly distinct constitutional and legal heritages, including those which have been promulgated relatively recently. These include the Constitution of the French Republic: 28 September 1958 (as Amended to 23 July 2008) (Fr), the Constitution of the Federal Republic of Nigeria: 29 May 1999 (as Amended to 26 July 2017) (Nigeria) and the Constitution of the Islamic Republic of Iran: 24 October 1979 (as Amended to 28 July 1989) (Iran).

### **(b) Limited Coverage of Labour Rights**

- 24 Most modern constitutional documents contain explicit labour rights-focused provisions. Some such documents provide for only a limited core of labour rights. Typically, these will include the right to work, the right to freedom of profession and the right to freedom of association in relation to relation to work, as well as those civil rights which have some connection to labour rights more generally. Such constitutional documents thus leave broader questions of labour rights and their attainment to the legislature within the constitutional system. Notable examples of this form of treatment of labour rights include the Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 23 December 2014) (Ger) and the Constitution of Japan: 3 November 1946 (Japan), with the latter specifying in Art. 27 that other more specific labour standards will be established by law.

### **(c) More Extensive Coverage of Labour Rights**

- 25 Many modern constitutions currently in force contain some combination of an obligation on the state to create certain labour rights, and a canon of labour rights within the constitutional instrument itself. These constitutional documents can be loosely typologized on a geographical basis.

#### **(i) Western Europe**

- 26 The Constitution of the Italian Republic: 22 December 1947 (as Amended to 20 April 2012) (It), the Constitution of the Kingdom of Spain: 6 December 1978 (as Amended to 29 September 2011) (Spain) and the Constitution of the Portuguese Republic: 2 April 1976 (as Amended to 12 August 2005) (Port) are paradigmatic examples of constitutions in the European tradition which go beyond the liberal canon of constitutional rights to include a far more extensive catalogue of labour rights. In particular, all three of these documents have relatively detailed provisions regarding collective rights of association and the right to strike. They also all contain detailed provisions regarding fair working conditions, for example the

detailed Art. 59 of the Portuguese Constitution on the Rights of Workers, and the more succinct Art. 35 of the Spanish Constitution.

**(ii) Eastern Europe**

- 27 Following the collapse of → *communism* and the revision of national constitutions in Eastern Europe, there was the inclusion of a number of important labour rights in Eastern European constitutional documents, in particular to guarantee collective labour rights at constitutional level. Particularly noteworthy examples are the Constitution of the Republic of Poland: 2 April 1997 (as Amended to 22 December 2015) (Pol) and the Constitution of the Russian Federation: 12 December 1993 (as Amended to 21 July 2014) (Russ). Both documents contain specific freedom of association rights, alongside more extensive catalogues of labour rights regarding fair labour practices and collective representation, found in Art. 37 in the Russian Constitution and Arts. 65 and 66 in the Polish Constitution.

**(iii) Latin America**

- 28 Extant Latin American constitutions generally have extremely extensive catalogues of labour rights, often taking inspiration from the traditions of the Political Constitution of the United States of Mexico: 5 February 1917 (as Amended to 5 February 2017) (Mex), which remains in force and contains an extensive catalogue of individual and collective labour rights. Many current constitutions in Latin America were developed following periods of dictatorship and, partly as a consequence, seek to entrench an extensive canon of social rights, including labour rights, alongside traditional civil and political rights. There are several important examples, including constitutional documents which came into force relatively recently. The Constitution of the Federative Republic of Brazil: 5 October 1988 (as Amended to 15 December 2017) (Braz) contains an extremely extensive catalogue of ‘social rights’ in Chapter II of Title I, including, in Art. 7, 34 separate rights for ‘urban and rural workers’. Arts. 8-11 also contain extensive treatment of collective labour and procedure. The Constitution of the Republic of Colombia: 5 July 1991 (as Amended to 4 April 2017) (Colom) contains an equally extensive treatment of rights in the content of its general principle of the *Estado Social de Derecho*, combining the German constitutional traditions of the *Rechtsstaat* and the *Sozialstaat*, taking direct inspiration from the juristic ideas behind the Weimar Constitution. There are numerous references to fair working conditions in the constitutional text, however of greatest importance is Art. 53 which establishes an extensive list of ‘minimal fundamental principles’ which should govern a ‘labour statute’ to be enacted by Congress. Notably, Art. 53 also specifies that ‘International labour agreements duly ratified are part of domestic legislation’.

**(iv) Africa**

- 29 The wave of new constitutions in African legal systems in the 1990s resulted in important developments regarding their treatment of labour rights. While the the Constitution of the Federal Republic of Nigeria: 29 May 1999 (as Amended to 26

July 2017) (Nigeria) is a relative outlier in this regard, given its limited treatment of labour treats, most extant African constitutions of recent genesis deal specifically with labour rights and their content. Of particular note are the constitutions of the South Africa (Constitution of the Republic of South Africa, 1996: 18 December 1996 (as Amended to 23 August 2013)) (S Afr), Malawi (Constitution of Malawi: 16 May 1994 (as Amended to 7 April 2017)) (Malawi) and Ethiopia (Constitution of the Federal Democratic Republic of Ethiopia: 8 December 1994 (Eth)). All three documents contain provisions which both establish the notion that workers have certain collective rights and rights to fair working conditions, while also mandating the production of a labour legislation by the competent legislative body. Particularly noteworthy are Art. 23 of the South African Constitution and Art. 31 of the Malawian Constitution, both of which contain an all-compassing and general right to 'fair labour practices'. Similarly, the recent Constitution of the Arab Republic of Egypt: 18 January 2014 (Egypt) contains a commitment in Art. 13 to 'workers' rights' and 'balanced work relationships'.

#### **(v) Asia**

- 30 Various extant Asian constitutions contain notable treatments of labour rights. Constitution of the Republic of India: 26 January 1950 (as Amended to 1 July 2017) (India) contains numerous rights in Part IV which provide an aspirational duty for the state rather than directly enforceable rights. These include the 'right to work' (Art. 41), 'just and human conditions of work and for maternity relief' (Art. 42), and a living wage and 'conditions of work ensuring a decent standard of life' (Art. 43; → *right to minimum level of subsistence*). Art. 43A, inserted by amendment in 1976, also establishes a right to 'codetermination', that is the right of workers to participate in the management of companies. Similarly, the Constitution of the Islamic Republic of Pakistan: 14 August 1973 (as Amended to 7 January 2016) (Pak) does not list labour rights among the Fundamental Rights in Chapter 1 of the Constitution, but rather within Chapter 2 covering 'Principles of Policy'. In particular, Art. 38 and Art. 39 provide that the State shall provide 'just and humane conditions of work' and 'facilities for work and adequate livelihood with reasonable rest and leisure' respectively. The current Constitution of China: 4 December 1982 (as Amended to 14 March 2004) (China), contains two specific provisions which concern labour rights. Art. 42 provides that 'the State creates conditions for employment, enhances occupational safety and health, improves working conditions and, on the basis of expanded production, increases remuneration for work and welfare benefits', while Art. 43 provides a more classically framed entitlement, that 'working people' have 'the right to rest'.

### **6. Assessment**

- 31 Several significant trends emerge from the examination of the place of labour rights within constitutional documents. Each constitutional settlement and document contains a slightly different constellation of labour rights and different accentuations on labour law and employment rights in general. The labour rights

which are afforded 'constitutional' status have to some extent reflected the political trade-offs and forces which have gone into the constitutional compromises resulting in the document. As the discussions in this section have revealed, a broad family of approaches have emerged over time and are still reflected in extant constitutions.

- 32 However, as time has progressed, constitutions have tended to have a more stable core of rights as labour rights, in particular freedom from discrimination, the freedom from forced labour, protections against child labour, and certain collective labour rights, alongside a more general policy commitment to fair or just employment standards. This has occurred as core labour rights have come to be perceived as fundamental human rights in international law and international legal documents, rather than as merely the result of a particular domestic political compromise. However, there remains a great variation in the breadth and nature of labour rights contained in constitutional documents. While certain constitutions contain individual 'claim rights' connected to employment, many provisions related to core labour rights come in fact in the form of guidance for, or duties on, legislators to promulgate subsequent legislation giving form and substance to those rights. While there is some degree of correlation between the nature of the constitutional treatment of labour rights on the one hand, and legal traditions, geographical vicinity and how recently the constitutional document was produced on the other, it is very difficult to draw up anything more than an indicative typology in this regard. The enforceability of constitutional labour rights within constitutional systems will of course reflect the general approach to such matters within that constitutional framework, but is additionally complicated by an overlapping series of factors which apply to labour rights more specifically; while many modern constitutions enumerate a canon of labour rights in the form of apparently enforceable 'claim rights', there are particular difficulties and controversies in this respect. Firstly, labour rights often involve rather imprecise, progressively attainable standards, which require intervention in relationships between private parties rather than between the individual and the state, as is more often the paradigm for constitutional rights. Secondly, labour rights are often seen as falling, at least partly, in the political realm, whereby the legislator requires a large degree of discretion to take political choices regarding the precise content and scope of labour rights (→ *discretion of the legislative body*). Thirdly, labour rights are often seen as being dependent on the general level of economic and industrial development of a country, and the particular economic circumstances at any given time. This is seen as making them unsuitable for judicial application, at least in a direct manner.
- 33 In general, these complexities have meant that the effectiveness and application of labour rights in constitutional documents has been variable, with many provisions in various contexts having been given no legal effect, regardless of whether they are framed as enforceable claim rights or guiding principles for legislators (→ *Seite: 15 legal effect of constitutions*). Given that labour rights generally require enacting legislation, regardless of whether they are enumerated in a constitutional canon, it is often said that there is no immediate correlation between the inclusion of labour



rights in a constitutional document and their realization or legal enforceability in practice. It is notable that an extremely common trend across geographical and temporal categories of constitution discussed in this entry has been the inclusion of a specific obligation on the legislator to produce a labour code or similar legal document.

- 34 However, in constitutional documents from various periods, including famous instances of documents with extensive coverage of labour rights, such as the historical Weimar Constitution (Ger), and the extant Constitution of the Italian Republic: 22 December 1947 (as Amended to 20 April 2012) (It) and Constitution of the Republic of Colombia: 5 July 1991 (as Amended to 4 April 2017) (Colom), significant parts of the constitutional text dealing with labour rights have remained entirely unimplemented and unenforced. This has underlined the importance of, on the one hand, the constitutional framework regarding the → *justiciability* of labour rights therein in that legal order, and, on the other hand, the implementation of labour rights through specific non-constitutional laws and subjective claim rights and institutional frameworks which give a concrete form to the goals and principles contained in the labour rights in the constitution, making the question of constitutional labour rights dependent on politics as well as law. The judicial application of constitutional rights and principles to employment relationships is dealt with elsewhere in this entry.

## **C. Constitutionality of Labour Rights: A Historical Typology of the Judicial Treatment of the Constitutional Legality of Labour Legislation**

### ***1. Overview***

- 35 Another important aspect of the relationship between labour rights and constitutional law has been the repeated question of the constitutionality, or legality within the constitutional order (see → *judicial review*), of labour rights as passed under ordinary legislation within that particular legal system. This has often been understood as being due to the prevalence of ‘liberal’ civil and political rights routinely found within constitutions, and indeed central to classical theories of constitutionalism, and their perceived tension with ‘social’ and labour rights. There has therefore emerged on occasion, in various constitutional systems, a legal question to be resolved through constitutional jurisprudence regarding labour rights their compatibility with other constitutional principles or rights. In other cases, a complex balancing of constitutional labour rights and other constitutional values has taken place. The outcomes of judicial reasoning in such cases has had significant impact on the form, importance, and even legality, of labour rights within each respective legal order. An important recurring theme has been whether certain labour rights are compatible with constitutional rights which entrench in some way the freedom of contract or the broader freedom to do business. Another important tendency within constitutional jurisprudence regarding labour rights has

been their place within the division of competences within federal constitutional systems (see → *federalism*).

## ***2. Compatibility of Labour Rights with Other Constitutional Rights and Principles***

### **(a) United States**

- 36 The most famous judicial treatment of this type of question is probably to be found in the famous case of *Lochner v New York* (1905) (US), although this case is now only of historical significance in terms of its outcome, as it has since been overruled. The → *Supreme Court of the United States* held that the reference to ‘liberty’ in the → *due process* clause of the Fourteenth Amendment to the Constitution of the United States of America: 17 September 1787 (as Amended to 7 May 1992) (US) entrenched an inalienable freedom to contract, holding that ‘[t]he general right to make a contract in relation to [one’s] business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.’ This right to ‘substantive due process’ meant that the legislature of the State of New York was precluded from interfering in the contractual employment relationship by limiting the working hours of bakers through the introduction of labour rights regulating working time. Subsequently, the Supreme Court altered its interpretation of those elements of the constitution to effectively overrule its jurisprudence and *Lochner* and similar cases, and held such labour legislation to be constitutional. Given the requirement to enact labour rights, whether enumerated in the constitution or otherwise, through ordinary legislation, as discussed elsewhere in this entry, the reaction of courts in cases such as this is particularly important.

### **(b) Federal Republic of Germany**

- 37 A similarly well-known instance of this type of constitutional jurisprudence with a contrasting outcome can be found in the *Mitbestimmung* (Co-determination) decision (1979) (Ger) before the → *Seite: 17* Federal Constitutional Court of Germany (*Bundesverfassungsgericht*), regarding the constitutional legality of a law granting workers’ representatives rights in company decision-making and representation on company boards. The court held that a series of complex objections to the law related to its alleged incompatibility with certain economic freedoms of the Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 23 December 2014) (Ger) Basic Law for the were unfounded and that the law in question was in line with the social aims and the economic freedoms contained in the constitution, thus giving the legislator a broad political discretion to enact labour legislation. This case illustrates the complexity of modern, pluralist constitutions with their contrasting traditions and goals. The Federal Constitutional Court’s decision in the case demonstrates a tendency, common within much jurisprudence of this type, to delegate matters of balancing social goals on the one hand, and civil and private law rights on the other, to the legislator.

### (c) European Union

- 38 A more recent example demonstrating the same tensions at a supranational constitutional level is the jurisprudence of the CJEU regarding the legality under EU law of national law and practice concerning collective labour rights, in particular the right to collective bargaining and the right to strike. In the cases of *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (CJEU) (2007) and *International Transport Workers Federation v Viking Line* (CJEU) (2007) the CJEU found that while the national laws in question were in line with the 'fundamental rights' recognized by EU law, their disproportionate use could violate the fundamental economic freedoms of individuals and companies guaranteed by the EU treaties and secondary legislation. This case is an important illustration of the renewed vulnerability of labour rights in the context of international forms of 'economic constitutionalism', which have re-entrenched certain economic rights and given them supra-constitutional status, this necessitating complex judgments by competent courts regarding the relative priority of labour rights.

### ***3. The Exclusion of Federal Competences in the Field of Labour Rights.***

- 39 Another important question for constitutional jurisprudence in some legal orders has been concerned with whether the competences reserved for the federal-level legislature in federal-type systems should be understood as allowing for the passing of labour rights where this competence has not been strictly reserved. In many legal systems, no such problem emerges, because labour rights are an exclusive or shared competence for the federal legislator. There are however several instructive examples from federal or quasi-federal legal systems, where there is no such clear federal reservation of labour competence.
- 40 Of historical significance is the treatment of this question by the US Supreme Court. Starting with the case of *Hammer v Dagenhart* (1918) (US), the court initially declared unconstitutional a series of federal labour law statutes in the early 20<sup>th</sup> century, by virtue of their inconsistency with the competences of the federal government as established in the Constitution of the United States of America: 17 September 1787 (as Amended to 7 May 1992) (US). The court held that the federal competence to regulate inter-state commerce did not allow federal regulation of the production of goods which were traded between states. These cases were subsequently effectively overruled through a changed interpretation of the meaning of federal competences in an equally significant series of cases starting with *US v Darby Lumber Co* (1941) (US), repudiating the previous jurisprudence and upholding federal legislation dealing with labour rights.
- 41 A different approach continues to hold sway in Canada, where there is a similar lack of reserved federal competence in the labour rights field. In *Toronto Electric Commissioners v Snider* (1925) (Can) it was held that labour rights and the regulation of the employment relation were, in essence, the sole competence of the provinces,
- the → Seite: 18
- Supreme Court of Canada (Cour suprême du Canada)* confirmed, in *Northern*

*Telecom v Communications Workers* (1980) (Can), that, in general, the Canadian Parliament, the federal legislature, does not have competence for labour relations or the terms of a contract of employment. This remains the law in the Canadian constitutional order. Such cases are significant because of the notion that labour rights should form a baseline of minimum standards for workers within a legal order. If the federal-level legislator is unable to pass legislation which has this effect, it is sometimes argued that labour rights can become the object of regulatory competition, undermining their fundamental status as rights.

- 42 A different outcome to a similar question can be seen in jurisprudence of the CJEU regarding the legality of certain labour rights contained in secondary legislation of the EU. In the case of *UK v Council* (CJEU) (1996), where the UK argued that a piece of EU secondary legislation (a directive purporting to regulate working time) fell outside the competence of the Union because it did not have the right to legislate on matters regarding aspects of labour rights and social policy except in certain circumstances where there existed unanimity amongst member states. The CJEU held that the legislation was *intra vires* due to a broad interpretation of the separate health and safety competence which had a different legislative procedure. Subsequently, the competences of the EU in the labour rights field, and indeed the place of labour rights more generally in the constitutional framework of the Union, have been expanded greatly meaning that such questions are less likely to arise. However, this example is instructive, because it illustrates that although most modern national constitutions now contain a catalogue of labour rights and/or a competence or even responsibility to promulgate legislation to guarantee such rights, as the locus of constitutionalism and constitutional rights and competences shift to the regional and international level, such questions of competence are capable of re-emerging.
- 43 The brief historical survey of examples illustrates the important link between labour rights and more general questions of constitutional divisions of competences. Where the right or duty to legislate on matters of labour rights has not been reserved in the constitution, the matter is resolved by the constitutional jurisprudence's understanding of how labour rights can be accommodated within other reserved fields of competence. This problem has been particularly pronounced for questions of labour rights partly because of the absence of labour rights within the original canon of constitutionalism, as discussed in other sections of this entry, as well as more modern constitutional instruments which do make specific detailed provisions regarding labour rights or a relevant federal competence.

## **D. The Application of Constitutional Rights to the Employment Relationship: a Comparative Typology of Judicial Approaches**

### ***1. Overview***

- 44 A third important tendency in the relationship between labour rights and constitutions and constitutional law has been the application of constitutional rights and principles to the employment relationship whether by horizontal application of,

or the interpretation of employment law in line with, general constitutional principles. This practice has often been known as the ‘constitutionalization’ of labour law. It has allowed, on occasion, the development of enforceable constitutional labour rights through the judicial application of more general political or civil rights to private employment relationships. The discussions in this entry regarding the growing inclusion of labour rights within the canon of constitutionalism and, by extension, national constitutions, generally reveal that while there are statements regarding the importance of labour rights, many constitutional documents link these to an obligation on the part of the legislator to enact these rights or more general guiding principles in the form of ordinary laws. The phenomenon of the direct horizontal application of constitutional rights, whether classical civil rights or more specific labour rights, to employment relationships between private parties is therefore particularly noteworthy. It generally emerges as the result of judicial activism rather than an explicit provision of enforceability of such rights in the constitution itself.

- 45 Where this process is observed, it can be seen as the application of the ‘constitutionalization’ of private law in general, as theorized recently by authors such as Alexy and Kumm where the constitution and its substantive principles are treated as the values which inform the content of the rest of the legal system, and where constitutional rights are given application between private parties. For such a relationship between labour rights and the constitution, the legal system must accept the application of constitutional principles and norms to relationships between private parties and not simply those involving the state. As Colombi Ciacchi has noted, this phenomenon is not confined to any particular legal order. It is rather a more diffuse legal practice. This section therefore examines some important examples of this phenomenon in order to develop a typology of various influential approaches rather than present a holistic geographical overview.

## ***2. Important Jurisdictional Examples of This Phenomenon***

### **(a) Federal Republic of Germany**

- 46 The most influential example of this practice is found in the practice of German constitutional jurisprudence, where the celebrated → *Lüth Case* (Ger) in which constitutional principles were applied to a private law relationship, has been applied in certain labour law cases. The German *Bundesarbeitsgericht* (Federal Labour Court, BAG) was presided by Hans Carl Nipperdey during the post-war period. He had extrajudicially proposed the idea (Nipperdey) that the constitution should be seen as the ‘general part’ of the Constitution, radiating out into the legal system in general, and informing all aspects of the development of German private law, including labour law. In a series of cases during the 1950s and 1960s the BAG applied Nipperdey’s approach in a strong form, holding that, by virtue of the *Sozialstaatsprinzip*, the ‘social state principle’, embedded in the Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 23 December 2014) (Ger), employees were entitled to rely on fundamental rights contained in the constitution against their private employer, in particular by virtue of the weaker

bargaining position of the employee. Following the celebrated *Free Speech Employment Case* (1954) (Ger) which established this general principle, the BAG developed an approach of direct application of the constitutional principle in question to the employment relationship, effectively generating new labour rights. This was explained on the basis that the terms of a collective agreements and individual employment contracts were functionally equivalent, as sources of rules, in the employment relation, to the general law, and therefore had to respect the fundamental rights, in these cases gender equality rights, of the employee. In subsequent cases, an 'indirect' horizontal application (*mittelbare* → *Drittwirkung*) was utilized, whereby the constitutional principles were applied through the 'general clauses' of the *Bürgerliches Gesetzbuch* (BGB), the German civil code, such as the duty of good faith (§242 BGB), the requirement that agreements do not infringe good morals (§138(1) BGB) and the prohibition of wilful damage contrary to public policy (§826 BGB). The German experience has been extremely influential, even being cited by other constitutional courts, such as the → *Seite: 21* *Constitutional Court of Spain (Tribunal Constitucional de España)* (Spain) in their development of similar doctrines in this field.

#### **(b) Italy**

- 47 Another influential case in this regard has been Italy, where the application of general constitutional rights in the employment context resulting in 'constitutional' labour rights has taken place through the indirect application of fundamental rights to the general terms of the *Codice Civile* (Civil Code) (It). In a series of cases regarding bullying at work, an area not covered by specific provisions in Italian employment law, the Italian *Corte di Cassazione*, the court of final appeal, held that the general articles of the Civil Code covering the well-being of the worker (Art. 2087), and the obligations of good faith (Art. 1175) and fairness (Art. 1375) should be interpreted in the light of several provisions of the constitution, primarily Art. 2 which recognizes the inviolability of human rights, granting the worker a remedy against the employer for failing to prevent such bullying. In other labour law cases, however, the *Corte di Cassazione* has been willing to apply constitutional rights, such as the → *right to* *Seite: 21* *freedom of conscience and religion or belief*, directly against employers, without need for recourse to the general terms of the civil code (case no. 1892 of 2000).

#### **(c) Spain**

- 48 A slightly different model can be witnessed in the jurisprudence of the Constitutional Court of Spain. The court has justified these developments through a so-called 'procedural effect' of constitutional rights, that is an obligation on the court itself, rather than on private parties, to respect constitutional rights. The major developments in this form of application of constitutional rights to private law have occurred in the labour law context. The *Tribunal Constitucional* held in an influential case in 1985 (Sentencia 88/1985 (*Free Speech at Work Case*) (Spain)) that the idea of 'industrial feudalism' is repugnant to the 'social and democratic

state' guaranteed by the Constitution of the Kingdom of Spain: 6 December 1978 (as amended to: 29 September 2011) (Spain), and that neither the rights of employers' associations nor the freedom to do business generate autonomous juridical spheres. As a consequence, these entitlements must therefore be exercised with respect for constitutional rights, in this case the right to free speech at work. Applications of such general rights to labour relations have generally occurred through the development of the general obligation the exercise of private law rights in good faith found in Art. 7 of the Spanish Civil Code.

#### **(d) Canada**

- 49 A recent significant instance of jurisprudence of this type has emerged in Canada, where there has been a series of cases regarding the applicability and meaning of the right to freedom of association, contained in Section 2(d) of the Canadian Charter of Rights and Freedoms, Constitution Act 1982 (Can), in the context of labour relations, and, in particular the legality of the exclusion of certain groups of workers from collective bargaining mechanisms provided in the law. In a complex series of cases the Supreme Court of Canada has held that this general right entitles workers to not be subject to a blanket exclusion from collective bargaining schemes (see, notably, *Dunmore v Ontario (Attorney General)* (2001) (Can)), although this does not require the Province of the employer to put any particular system of collective representation in place (*Ontario (Attorney General) v Fraser* (2011) (Can)). From this complex series of cases there emerges the apparent importance of both the precise meaning of specific constitutional rights and their subsequent application to the labour context in the form of more or less specific labour rights, as well as the general willingness or otherwise of the court to subject the law regulating dealings between private parties in the employment context to constitutional principles and rights.

#### **(e) Israel**

- 50 Another important instance of this jurisprudential phenomenon can be identified in the application of 'constitutional' principles of the Israeli legal system to employment relationships. This has occurred notwithstanding two potential obstacles, making it a noteworthy instance. Firstly, there is no formal written entrenched constitutional document in the Israeli legal order, but rather a piecemeal system of 'Basic Laws' containing a number of fundamental rights. In addition, those Basic Laws are addressed exclusively to public authorities. However, the Israeli National Labour Court has justified their extension by virtue of the perceived need to ensure private law relationships are in line with the values of fundamental rights, thus effectively generating and entrenching specific labour rights. Furthermore the court has argued that *a fortiori* this approach should hold sway in specific field of employment relations by virtue of the inequality of bargaining power which exists in such relationships (see, for instance, *Horn v New Labour Union* (2000) (Isr)).

### ***3. Assessment***

- 51 The jurisprudence in this section is often considered to be the emergence of a converging synergistic phenomenon of the development of labour rights through the application of general constitutional rights and principles to the employment relationship. However, this practice is extremely diverse in form and content, and depends heavily on two important factors. Firstly, there must be a clear mechanism for the application of constitutional rights to private employment situations. The jurisdictions considered here show that this might come in various forms, whether through direct application, or through the interpretation of 'general clauses' of private law or of employment law norms in general. This has overcome, in some cases, a more general perception of constitutionalism and constitutional rights as regulating exclusively the relationship between the state and private individuals. Such horizontal applicability of rights might be justified along several different lines: the constitution might be seen as providing general principles for the legal system as a whole; the nature of employment relationships and the inherent power nexus that exists therein might be seen as making them akin to the relationship of power between the state and the individual in some sense; or the court, being an emanation of the state, might see itself as required to reason and interpret the law in line with fundamental constitutional rights, regardless of the private nature of employment relationships. Secondly, once the hurdle of the private nature of employment relationships has been overcome, the court must decide whether and how the constitutional right or principle in general applies to employment relationships, thus potentially generating specific labour rights. This phenomenon illustrates how labour rights can emerge from constitutions regardless of the presence of labour rights in the canon of fundamental rights or the special treatment of labour rights in general. However, it is very much dependent on more general constitutional jurisprudence, and is a relatively nascent area even in legal systems within which one can witness the phenomenon.

### **E. Concluding Observations Regarding Labour Rights and Constitutional Law**

- 52 Labour rights continue to enjoy a rather complex relationship with constitutions and constitutional law. While there has been a marked tendency to include a greater number of labour rights, both collective and individual, within constitutional documents, these remain precarious in terms of their enforcement in many cases where these are not directly applicable. In many cases, there is a requirement for more specific promulgation of labour rights within ordinary statutes, the production of which is often prescribed within constitutional instruments. Equally complex is the relationship between labour rights, including those contained within constitutional law, and other core constitutional principles, such as the right to the private property and freedom of contract. The role of constitutional jurisprudence in carrying out complex tasks of interpretation and balancing in such cases can be crucial, as is the level of discretion they give to legislators to make laws according



to political decisions in this regard. At the same time, there has been a marked tendency in many legal systems to interpret more general civil and political rights to include certain labour rights and/or be applicable to the private contract of employment, even in circumstances where there is no extensive canon of labour rights within the constitution. Again, the role of courts is crucial in this respect. Analysis of much such jurisprudence reveals the importance of the general constitutional principles such as democracy and freedom, as well as specific constitutional rights, in the eyes of the courts, and their application to employment relationships. As constitutionalism and entrenched constitutional rights shift to regional, inter- and supranational levels, the place of labour rights within this complex layered tapestry remains fraught, in particular in view of the preponderance of economic constitutionalism and entrenched economic freedoms, which are sometimes seen as marginalizing labour rights, despite an extensive canon of labour rights in international law, underlining the continued centrality of the question of labour rights in constitutional thought and their relationship with other constitutional principles.

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